IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.371 OF 1988

Smt.Muktabai w/o Laxman Kadam ...Appellant

Vs.

1. Dashrath Aba Gunge
2. Smt.Manjulabai w/o Shamu Gunge
3. Hariba Shamu Gunge ...Respondents

Mr.B.P.Abhale for the Appellants.
Mr.K.Y.Mandlik for Respondents.

CORAM: A.S.OKA, J.
DATED: AUGUST 9, 2004.

ORAL JUDGMENT :

1. On July 22, 1988 this Court admitted the Second Appeal. However, substantial question of law was not framed at the time of admission of the Appeal. A Second Appeal cannot be heard finally unless a substantial question of law is framed and the Second Appeal is required to be heard finally on the substantial question of law which is framed.

2. When this Court admitted the Second Appeal in the year 1988, obviously this Court felt that the substantial question of law was involved in this Second Appeal. As the Second Appeal is of the year 1988, it will be unjust to the parties to relegate them to the stage of Admission of the Appeal after lapse of 16 years. Hence, I have exercised power under the proviso to sub Section 5 of Section 100 of Code of Civil

Procedure, 1908 and have formulated the substantial question of law arising out of the Second Appeal. The said substantial questions of law have been raised in the Memorandum of Appeal and therefore the same are formulated. The Following substantial questions of law arise in this Second Appeal :

> (1) "Whether the Appellate Court committed an error by relying upon the documents at Exh.74 and 75 though the said documents were not proved in accordance with provisions of Indian Evidence Act, 1872 ?
>
> (2) Whether the Appellate Court committed an error by not framing points for determination on the basis of Issue Nos. 9 and 10 as framed by the Trial Court ?
>
> (3) Whether the Appellate Court ought to have framed point for determination on real nature of transaction between the parties?"

3. I have heard the Counsel appearing for the parties on the aforesaid substantial questions of law.

4. For appreciating the submissions made by the learned Counsel appearing for the parties, it is necessary to briefly refer to the facts of the case. The Appellant in the Second Appeal is the original Defendant No.3. The Respondent No.1 is the original Plaintiff and the Respondent Nos.2 and 3 are the original Defendants No.1 and 2. The subject matter of the suit is the property described in the paragraph No.1 of the plaint which is one half share in the Gat No.74. The

Respondent No.3 is the son of Respondent No.2. The Appellant is the daughter of Respondent No.2. The case of the Respondent No.1 is that the suit land is of the ownership of the Respondent Nos.2 and 3 and the suit land was being cultivated by the Respondent No.1. According to the Respondent No.1 an agreement for sale was executed on 18th October 1969 by the Respondent Nos.2 and 3 in his favour. In the agreement the agreed price was fixed at Rs.750/-. He stated that a sum of Rs.700/- was already paid to the Respondent Nos.2 and 3. The case of the Respondent No.1 is that permission of competent authority was required for sale and the sale deed was to be executed within one month from the date of obtaining permission from the Respondent Nos.2 and 3 and the balance amount of Rs.50/- was to be paid at the time of execution of the Sale Deed. The case of the Respondent No.1 in the plaint it that on 12th March 1979 one third portion of the suit land described in paragraph No.1 of the plaint was sold and conveyed by the Respondent Nos.2 and 3 in favour of the Appellant who is the daughter of the Respondent No.2. The prayer in the suit is for specific performance of the agreement for sale dated 18th October 1969.

5. The suit was resisted by the Respondent No.2 by filing a written statement. A contention raised by the Respondent No.2 is that the possession of the suit land was never delivered to the Respondent No.1 and the agreement was

executed as a security for the repayment of the loan advanced by the Respondent No.1 to the Respondent No.2. It is contended that on the date of execution of the alleged agreement, price of the suit land was about Rs.20,000/- and therefore, the suit land could not have been sold only at the price of Rs.750/-.

6. The Appellant also filed a separate written statement. It is stated in the written statement that the Appellant was not aware about the execution of the suit agreement. The contention of the Appellant is that the suit land being ancestral property, she has one third share in the suit land and by registered sale deed dated 12th March 1979 she has acquired one half share in the suit land bearing Gat No.74. Therefore, she contended that her share in the suit land is five sixth.

7. The learned Trial Judge dismissed the suit. The learned Trial Judge held that the Respondent No.1 is not entitled to relief of specific performance. The learned Trial Judge recorded a finding that the the Respondent No.1 has made some alteration in the original suit agreement and that he has failed to prove that the Respondent Nos.2 and 3 have one half share in the suit land. An Appeal was preferred by the Respondent No.1 in the District Court. The Appellate Court referred to the document at Exh.74 and 75. Exh.74 is the certified copy of the application given by the Respondent

No.2 for obtaining sale permission for sale of the suit land. Exh.75 is the certified copy of the statement of the Respondent No.2 recorded before the Assistant Collector, Pandharpur in which is it stated that the Respondent No.2 was desirous of selling one half portion of the suit land. The learned Judge held that it was not possible to accept the case that the Respondent No.1 has made any alteration in the suit agreement. The learned Appellate Court further held that the Constituted Attorney of the Respondent Nos.2 and 3 admitted that the Appellant was present at the time of execution of the suit agreement. The Appellate court held that there was evidence on record to establish the suit agreement and that the Appellant has failed to prove that she was a bonafide purchaser. Therefore, the Appellate Court proceeded to pass a Decree for specific performance.

8. Being aggrieved by the Decree passed by the Trial Court, the Appellant-original Defendant No.3 has preferred this Appeal. The learned Counsel for the Appellant submitted that the documents at Exh.74 and 75 could not have been read in evidence as the same are not being proved. He also submitted that the said documents might have been exhibited but that does not mean that the same have been proved in accordance with Indian Evidence Act,1872. He submitted that it was the specific case of the Appellant that she was not aware about the suit transaction and the suit agreement. A contention to that effect has been raised in the written statement. He

submitted that if the documents at Exh.74 and 75 are considered. It is very clear that there is no indication in the said documents that any Agreement for sale was executed in favour of the Respondent No.1. He submitted that the Trial Court found that there were alterations made by the Respondent No.1 in the suit agreement. The learned Counsel further submitted that the Trial Court has held that the real nature of the transaction between the parties was a loan transaction and therefore a specific point for determination on that aspect ought to have been framed. He lastly submitted that discretion was exercised by the Trial Court under provisions of Specific Relief Act, 1963 and therefore the Appellate Court could not have interfered as the exercise of discretion by the Trial Court was not arbitrary.

9. The learned Counsel for the Respondent No.1 submitted that the decree is passed against the Respondent Nos.2 and 3 who are Defendant Nos.1 and 2 and therefore, the Appellant alone is not entitled to challenge the said decree. The Appellant is claiming through the Defendant Nos.1 and 2 and as the Defendant Nos.1 and 2 have not challenged the Decree, the challenge at the instance of the Appellant cannot be entertained. He submitted that the Appellant has not stepped into the witness box to prove that she is a bonafide purchaser without notice. He submitted that as the Decree passed is against the vendors of the Respondent No.1 has attained finality, the Appellant who is admittedly claiming

through the original Defendant Nos.1 and 2 is not entitled to challenge the Decree.

10. I have considered the submissions made by the Counsel appearing for the parties.

11. The case of the Appellant is that she is a bonafide purchaser and apart from one half share in the land acquired on the basis of sale deed executed in the year 1979, she already had one third share in the land. A contention is raised that as she already had one third share in the suit land, she can always challenge the decree passed against the Respondent Nos.2 and 3 which is in respect of one half undivided share in the suit land. The second contention is that the Appellant is the bonafide purchaser and therefore suit transactions between the parties i.e. the Respondent No.1 on the one hand and Respondent No.2 on the other hand, is not binding on her.

12. Before considering the submissions on the merit made by the Appellant it is necessary to consider the submissions made by the learned Counsel for the Respondent No.1 as regards maintainability of the Appeal by the Appellant. It is pertinent to note that the prayer for specific performance in the suit is made as against the Respondent Nos.2 and 3. Apart from claiming one half share on the basis of sale deed executed in the year 1969, the Appellant has pleaded that he

had one third share in the land as the same was ancestral property. It is pertinent to note that the Appellant has admittedly not stepped into witness box. The Appellant is the daughter of the Respondent No.2. One Shivaji Jadhav has been examined in his capacity as Constituted Attorney of the Respondent No.2. The said Shivaji has stated that he is the nephew of the Respondent No.2. Apart from the fact that the Appellant has not stepped into witness box to say that she had no knowledge of the suit agreement, even the Constituted Attorney of the Respondent No.2 has not stated that the Appellant had no knowledge about the agreement for sale.

13. The burden to prove the fact that the Appellant had no knowledge about the suit agreement and the Appellant was a bonafide purchaser was on the Appellant. The Appellant being daughter of the Respondent No.2, it is very difficult to believe that she was not aware about the suit agreement. Even if it is assumed that she was not aware of the suit agreement it is not enough to come to the conclusion that she is a bonafide purchaser. To prove that she was a bonafide purchaser it was necessary for the Appellant to lead evidence to show that she made necessary enquiries before entering into the transaction as any prudent man would have done it. There is nothing on record to show that she made enquiry with her mother -Respondent No.2 to ascertain whether there was any prior transaction. Apart from the fact that the Appellant has not entered into witness box, it is not her

case in the written statement that the purchase made by her was a bonafide purchase and she entered into the transaction only after making enquiry not only with the Respondent No.2 but also with the Revenue Authorities. Thus, no fault can be found with he findings of the Appellate Court that the Appellant has failed to prove that she is a bonafide purchaser. Therefore, the Appellant who is claiming through the Respondent Nos. 2 and 3 cannot claim any right other than the rights possessed by the Respondent Nos.2 and 3 and she cannot claim that the agreement for sale is not binding on her. The Decree for specific performance was prayed for only as against the Respondent Nos.2 and 3 as regards one half share in the suit property. If the Appellant failed to prove that she is a bonafide purchaser and that she had no knowledge about the suit agreement, she is naturally bound by the suit agreement executed in favour of the Respondent No.1.

14. In the written statement it is contended that apart from one half share purchased by the Appellant she had one third share in the suit land as the land was an ancestral property. Even if the said contention was to be established it was necessary for the Appellant to prove that the suit land was held by her father as ancestral property. It was necessary for the Appellant to atleast state that her father expired after coming into force Hindu Succession Act,1956 so that she could have acquired a share in the undivided share of her father in the property. As stated earlier she has not led

any evidence that the property is ancestral property held by her father and that her father expired after coming into force Hindu Succession Act, 1956. If the father has expired prior to the commencement of the said Act of 1956 she will not acquire any share in the undivided share of her father in the suit land. Even if the witness examined on behalf of the Respondent No.2 has not stated that the land was an ancestral property, in the suit agreement it is stated that the suit land was a self acquired property of the Respondent No.2 and it was the property inherited by the Respondent No.3. Even if reliance is placed on the recital that the suit land was property inherited by the Respondent No.3, it is not sufficient to come to the conclusion that the Appellant had undivided share in the suit property. For that evidence is required to be led to the effect that the Appellant's father expired after coming into force Hindu Succession Act, 1956. Thus, it is established that the Appellant had no interest in the suit land apart from the alleged interest purportedly acquired on the basis of the registered sale deed.

15. In this view of the matter, the Appellant has failed to prove that she is a bonafide purchaser. In my view the objection raised by the learned Counsel for the Respondent No.1 that she cannot claim any better rights than the rights possessed by the Respondent Nos.2 and 3 appears to be correct. As stated earlier the Respondent Nos.2 and 3 have not chosen to challenge the decree passed against them and to

challenge the finding recorded against them. Therefore, the challenge to the decree at the instance of the Appellant has no substance as the Appellant is not a bonafide purchaser. However, I must make it very clear that the observations regarding independent right, title or interest of the Appellant are made in the Judgment only for the purposes of deciding this Appeal. The suit agreement is only in respect of one half share in the land and therefore, if the Appellant has any share on the basis of inheritance from her father it is for her to establish the same in the appropriate proceedings.

16. In view of this position it is not necessary to consider the challenge of the Appellant on the merits of the Decree passed by the Appellate Court. The Decree has attained finality in so far as the Respondent Nos.2 and 3 are concerned. Hence, there is no merit in the Appeal and subject to observations made in earlier paragraph, the same is dismissed. There will be no order as to costs.

Judge.